that the father has demonstrated in the child, his willingness to support the child, to provide it with necessities, to provide for the child's medical care and other evidences of his concern, we now feel that he should be granted some visitation rights. We will retain jurisdiction in the case for the making of such additional orders as may be required from time to time.

ORDER OF COURT

NOW, November 23, 1976, the order heretofore made is annulled and it is ordered that Kenneth Hurd, petitioner, shall have the right to visit with James Allen Wishard on Saturday, December 4, 1976 from 9:00 o'clock a.m. until 6:00 o'clock p.m., and every second Saturday thereafter. The said Kenneth Hurd shall provide the noon and evening meals and all transportation in effecting such visitation rights.

The Court retains jurisdiction for the making of such further orders as may be required. The parties shall each pay their own costs. Exceptions granted to both parties.

PUGH v. HOLMES, C.P. FRANKLIN COUNTY BRANCH, NO. 16 AUGUST TERM, 1976; HOLMES V. PUGH, C.P. FRANKLIN COUNTY BRANCH, NO. 15 NOVEMBER TERM, 1976

Landlord and Tenant - Warranty of Habitability

1. A landlord's failure to maintain leased premises in a safe, sanitary and healthful condition fit for human habitation is not a valid defense to a suit by a landlord against a tenant for rent due or for possession.

2. There is no implied warranty of habitability in the common law of Pennsylvania and caveat emptor in landlord-tenent matters remains the law in Pennsylvania.

Stephen E. Patterson, Esq., Attorney for Plaintiff

David Woodward, Esq., Legal Services, Inc., Attorney for Defendant

OPINION AND ORDER

Keller, J.:

J. C. Pugh commenced an action in assumpsit before Justice of the Peace Joseph W. Gotwals to recover rent due on

an oral month-to-month lease for the balance of rent due for the month of September 1975, and for additional full months at the rate of Sixty ($60.00) Dollars per month. Judgement was entered in favor of the plaintiff on April 20, 1976. On May 10, 1976, the Court on petition of the defendant entered an order relieving the defendant from the payment of any costs of appeal from the judgement in assumpsit and ordered that the costs be advanced by the County of Franklin by reason of the indigency and inability of the defendant to pay any part of the costs of appeal. Pursuant to the rule to file a complaint, the plaintiff on June 4, 1976 filed his complaint in assumpsit alleging that the plaintiff is the owner of the real estate located at 15 Spruce Street, Chambersburg, Franklin County, Penna.; that the defendant resides in the said premises pursuant to an oral month-to-month, lease under the terms of which the defendant agreed to pay to the plaintiff rent in the amount of Sixty ($60.00) Dollars per month, payable in advance the first day of the month. The complaint further alleges that rent remains due and unpaid in the amount of Thirty-six ($36.00) Dollars for the month of September 1975, and for the total amount of rent due for the months of October 1975 through June 1976. The complaint was served by counsel for the plaintiff upon Legal Services, Inc., counsel for the defendant, by mail on June 7, 1976. On July 2, 1976, the defendant filed her answer containing new matter. The answer admits essentially all of the allegations of the plaintiff's complaint, including the fact that the rent remains unpaid. However, the defendant avers that the rent is not due and her obligation to pay rent was and continues to be abated due to the plaintiff's failure to maintain the leased premises occupied by her in a safe, sanitary and healthful condition fit for human habitation. Under new matter the defendant alleges that there is inherent in the oral lease between the parties an implied warranty of habitability, which imposes upon the plaintiff a legal duty to maintain the leased premises in a habitable condition and to promptly repair all conditions that render the premises hazardous, unsafe, unsanitary or otherwise unfit for human habitation; and that the leased premises have been in a defective, unsafe and unsanitary condition unfit for human habitation since on or about September 1975, and remain in such condition. By way of amplification, the defendant alleges the defective conditions include inter alia a leaking roof, a non-functioning hot water heater, malfunctioning plumbing facilities, a cockroach infestation, cracked interior walls of certain rooms, broken, defective and hazardous steps leading to the rear entrance, a defective and damaged front porch floor

and a non-functioning light switch and light in the kitchen. The plaintiff demanded judgment in the amount of $576.00, together with interest and costs. The defendant seeks a dismissal of the plaintiff's complaint and the issuance of an order abating the defendant's obligation for the payment of rent for so long as the premises remain in a defective, unsafe, unsanitary and hazardous condition as to be unfit for human habitation.

This proceeding was docketed to No. 16, August Term 1976.

The plaintiff, J. C. Pugh, commenced an action before Justice of the Peace Joseph W. Gotwals seeking a judgment for possession of real property and rent remaining due against the defendant, Eloise P. Holmes. Judgment was entered in favor of the plaintiff on August 17, 1976. On September 3, 1976, an order was entered relieving the defendant from the payment of any costs of appeal from the judgment of the Justice of the Peace and ordering that the costs be advanced by the County of Franklin by reason of the indigency and inability of the defendant to pay any part of the costs of said appeal. On the same date the defendant posted a cash bond in the amount of $180.00 with the Prothonotary conditioned for the payment of any judgment for rent and for damages arising from occupancy or injury to the property that may be rendered against her on appeal, and to ensure that the notice of appeal would constitute a supersedeas. Pursuant to a rule to file a complaint the plaintiff filed a complaint on September 24, 1976 alleging ownership of the premises, 15 Spruce Street, Chambersburg, Penna., and the leasing of the same to the defendant on an oral month-to-month lease requiring the payment of rent in the amount of $60.00 per month on the first day of each month. The complaint alleges the judgment secured by the plaintiff before Justice of the Peace Gotwals and the appeal to No. 16, August Term 1976, supra,; that notice was given by the plaintiff to the defendant according to law on October 4, 1975, and that the defendant refuses to relinquish possession of the real estate. The plaintiff seeks a judgment against the defendant for the rent due for the month of June through September 1976, together with interest and costs and a judgment for possession of the premises. The complaint was served on Legal Services, Inc., counsel for the defendant, by mail on September 24, 1976.

On October 22, 1976, the defendant filed her answer containing new matter and a counterclaim and the same was served on counsel for the plaintiff by mail on the same date. The answer essentially admits the averments of the plaintiff's complaint except to allege that though certain rent has not been paid, it is not due by reason of her obligation to pay rent having been abated due to the failure of the plaintiff to maintain the premises leased in a safe, sanitary and healthful condition fit for human habitation. Under new matter the defendant asserts the defense of implied warranty of habitability, all as set forth above. As an additional previously unalleged defective condition, the defendant asserts that the kitchen stove has been defective and has malfunctioned since the spring of 1976. By way of counterclaim the defendant alleges the plaintiff is indebted to her in the amount of $25.00 by reason of payments made by the plaintiff to purchase replacement heaters, parts to cover the bathroom floor and replace a broken window pane. The defendant seeks relief by way of a dismissal of the plaintiff's complaint; the issuance of an order abating the defendant's obligation to pay rent for so long as the premises remain unfit for human habitation; and judgment in the amount of $25.00.

This case was docketed to No. 15, November Term 1976.

The plaintiff filed preliminary objections to defendant's answer to No. 16, August Term 1976 and preliminary objections to the defendant's answer and new matter and counterclaim to No. 15, November Term 1976. Preliminary objections filed by the plaintiff in each case were in the nature of a demurrer alleging that the defense in new matter and counterclaim failed to set forth a defense to the plaintiff's cause of action.

For the purpose of the plaintiff's demurrers all well-pleaded facts are deemed admitted and the sole issue presented for adjudication is whether an implied warranty of habitability on rental dwellings exist as a matter of law in the Commonwealth of Pennsylvania. Counsel for both parties have presented excellent briefs and well-reasoned arguments in support of their respective positions.

The defendant's brief is not only well drafted, but exhaustive in its exposition of the trend in the United States toward the acceptance of the implied warranty of habitability in rental cases. The bulk of the defendant's arguments can also

be found in "Tenants Rights in Pennsylvania: Has the Middle-Class Tenant Been Forgotten" 12 Duq. L. Rev. 48, 61-66 (1973). It is interesting to note that in this Law Review Comment the writer acknowledges that the arguments are not current law in Pennsylvania, but represent the urging for reform of our Landlord-Tenant Law to implement the suggested improvements.

Despite the numerous Pennsylvania Appellate Court cases cited by the defendant, we find none that effectively support the position urged by her. For example, *Elderkin Vs Gaster*, 444 Pa. 118 (1972) is a builder's case and concerns the responsibility of the seller; and in *Reitmeyer vs Spreacher*, 431 Pa. 284 (1968), the court addressed itself to a landlord's liability to a tenant arising out of a fall on a defective porch after an oral promise by the landlord to repair.

The only Pennsylvania case directly on point and supporting the defendant's contention is *Derr vs Cangemi*, 66 D&C 2d 162 (1974). In that case Judge Kubacki of the Philadelphia Court of Common Pleas found for the defendant on the grounds that an implied warranty of habitability in all residential leases did exist by analogy to the *Elderkin vs Gaster*, supra, and *Reitmeyer vs Spreacher*, supra, rationale. Judge Kubacki acknowledged that there were no appellate court cases in Pennsylvania supporting his decision. He stated:

> "Nine other jurisdictions have already held that there is an implied warranty of habitability in all residential leases. This warranty implies that the landlord has placed the rented premises in a livable condition prior to the occupancy by the tenant; or that he will do so within a reasonable time after the occupancy of the demised residence; that the facilities will remain usable during the entire term of the lease and that the landlord will maintain the demised premises in a condition which will render the premises livable. This does not require the landlord to ensure that the leased premises are in a perfect, aesthetically pleasing condition; but it does mean that the bare living requirements must be maintained. Any repairs made necessary by reasonable wear and tear are the responsibility of the landlord. The very least that the landlord should do is to comply with the standards set by the local housing code. These cases hold that the covenant of the tenant to pay rent, and the covenant, express or implied, on the part of the landlord to maintain the premises in a habitable condition, are

SUBSCRIBERS:

Please read each issue of the advance sheets, from cover to cover. The Journal hopes these advance sheets will become important sources of information useful to the legal profession and other persons dealing with the Bar. The Opinion pages are important, but the advertising and news items will probably also be worthy of your full attention.

LEGAL NOTICES

Notice is hereby given for the intention to file with the Secretary of the Commonwealth of Pennsylvania and with the Prothonotary of Franklin County, Pennsylvania, on the 20th day of July, 1977, a certificate for the conductng of a business at 15 Strine Alley, Waynesboro, Franklin County, Pennsylvania, under the assumed or fictitious designation of Spray Mist, for the purpose of operating a car wash. The persons owning an interest in said business are: T. Michael Bowers, 801 South Potomac Street, Franklin County, Pennsylvania; and Wanda D. Bowers, 801 South Potomac Street, Franklin County, Pennsylvania.

ULLMAN AND PAINTER
Trust Company Building
Waynesboro, Pa. 17268

(7-15)

Notice is hereby given that Harold E. Strite and Eileen Strite of R. D. 6, Box 84, Waynesboro, Pa., being the only persons owning or interested in a business to be conducted at R. D. 6, Waynesboro, Franklin County, Pennsylvania, under the name or designation of Strite's Garage will file their application for registration of said name in the office of the Secretary of the Commonwealth of Pennsylvania and in the office of the Prothonotary of Franklin County, Pennsylvania, on or after July 15, 1977.

MAXWELL & MAXWELL
Attorneys

(7-15)

AUDITOR'S NOTICE

Notice is hereby given that David W. Rahauser has been appointed Auditor in the Estate of Roy C. Raifsnider, late of the Borough of Chambersburg, Franklin County, Pennsylvania, deceased. The First and Final Account in said estate filed April 29, 1977, reveals a balance for distribution for the Accountant is unable to file therewith a statement of proposed distribution. The time and place of the Auditor's hearing is Thursday, July 28, 1977, in the office of David W. Rahauser, Rooms 206-208 Chambersburg Trust Company Building, Chambersburg, Pennsylvania. The Auditor will sit for the performance of his duties at 1:30 o'clock p.m., prevailing time and will hear all claims upon the funds of the estate which are to be distributed. Any persons having claims who do not present and prove them before the Auditor will be forever barred from participating in the fund for distribution.

David W. Rahauser, Auditor
Rooms 206-208 Chambersburg Trust Company Building
Chambersburg, Pennsylvania 17201

(7-1, 7-8, 7-15)

YOU MAY WISH TO NOTE:

— Subscriptions to the advance sheets of this journal are available to lawyers and any other persons or institutions interested. See the managing editor.

LEGAL NOTICES

IN THE COURT OF COMMON PLEAS OF THE 39TH JUDICIAL DISTRICT OF FRANKLIN COUNTY, PENNSYLVANIA, ORPHANS' COURT DIVISION

The following list of Executors, Administrators and Guardian Accounts, Proposed Schedules of Distribution and Notice to Creditors and Reasons Why Distribution cannot be Proposed will be presented to the Court of Common Pleas of Franklin County, Pennsylvania, Orphans' Court Division for CONFIRMATION: August 4th, 1977.

Clugston	First and Final Account, Statement of Proposed Distribution and notice to the creditors of Helen R. Clugston, executrix of the estate of John C. Clugston, late of Chambersburg, Franklin County, Pennsylvania, Deceased.
Strickler	First and Final Account, Statement of Proposed Distribution and notice to the creditors of Helen S. Hawbaker and Mary S. Hentzleman, executrices of the estate of Mary Erma Strickler, late of the Borough of Chambersburg, Franklin County, Pennsylvania, Deceased.
Hawbaker	First and Final Account, Statement of Proposed Distribution and notice to the creditors of Karl Eugene Hawbaker, administrator of the estate of John S. Hawbaker, late of Peters Township, Franklin County, Pennsylvania, Deceased.
Keller	Second and Final Account, Statement of Proposed Distribution and notice to the creditors of The Valley Bank & Trust Company, successor to National Valley Bank & Trust Company, executor of the estate of Frank R. Keller, late of St. Thomas Township, Franklin County, Pennsylvania, Deceased.
Keefer	First and Final Account, Statement of Proposed Distribution and notice to the creditors of Hazel May Glouner, executrix of the estate of Clarence Lester Keefer, late of Montgomery Township, Franklin County, Pennsylvania, Deceased.

Glenn E. Shadle
Clerk of Orphans' Court
Franklin County, Penna.

(7-8, 7-15, 7-22, 7-29)

NOTICE TO THE BAR: Many inquiries have been received concerning the Journal's Estate Notice forms heretofore made available. Actually, the notices will be printed as appears in our issue of July 8, 1977.

New forms have been ordered and should be available this coming week.

> mutually dependent. They have designated that among the remedies available to the tenant are the right to defend an action for possession by the landlord; the right to make repairs and deduct the cost from the rent; the right to recover the security deposit; the right to vacate the premises; and the right to sue the landlord for the difference between the rent paid and the actual value of the demised premises in its poor condition." (page 167-168)

In *Northchester Corp. vs Soto*, 58 D&C 2d 256 (1972); *Beasley vs Freedman*, 70 D&C 2d 751 (1974), and *Fox vs Seigel*, 73 D&C 2d 623 (1975), the Courts of Common Pleas of Bucks County and York County concluded there is no implied warranty of habitability. We find the opinions of our sister courts in Bucks County and York County persuasive. We agree with their rationale and the conclusion reached. We conclude there is no implied warranty of habitability in the common law of Pennsylvania.

Counsel for the defendant urged this Court to follow the lead of *Derr vs Cangemi*, supra, in rejecting the doctrine of caveat emptor in landlord-tentant matters. This we decline to do for the following reasons:

1. Pennsylvania is essentially a common law state and the doctrine of stare decisis retains its viability in this Commonwealth. Caveat emptor in landlord-tenant matters remains the law in Pennsylvania. *McAuvic vs Silas*, 190 Pa. Super. 24, 151 A. 2d 662 (1959), *Federal Metal Bed Co. vs Alpha Sign Co.*, 289 Pa. 175 (1927).

2. There is an inherent philosophical inconsistency in the contention that a leased premises is uninhabitable, which eliminates the tenant's promise to pay rent, but the tenant has an unlimited right to continued occupancy of the premises unfit for human habitation. (See *Robinson vs Diamond Housing Corp.*, 463 F. 2d 853 (1972), where the U. S. Court of Appeals (D.C. Circuit) stated at page 865: "Southall Realty and the housing code guarantees the right of a tenant to remain in possession without paying rent when the premises are burdened with substantial housing code violations making them unsafe and unsanitary.")

3. Recognition of an implied warranty of habitability is a conscious effort to change the common law rights of landlords and tenants and to establist a new social policy. It is the

judgment of this Court that the adoption of social policy as a part of the law is a legislative and executive function--not one constitutionally delegated to the judiciary.

4. Finally, the Courts of Common Pleas of this Commonwealth as presently constituted simply do not have the manpower resources, the requisite technical knowledge or the time to inspect, investigate, negotiate and enforce landlord-tenant relationships involving questions of habitability.

ORDER

NOW, this 14th day of April, 1977, the plaintiff's demurrers in each captioned case are sustained.

Exceptions are granted the defendant.

KUHN v. LeFEVRE, C.P. FRANKLIN COUNTY BRANCH, EQUITY DOCKET VOLUME 7, PAGE 97

Real Property - Adverse Possession - Tacking - Mention of Alley in Prior Deed

1. Purchasers of lots from a plan on which a private alley appeared acquire rights which are entitled to protection.

2. A conveyance of property which refers to a private alley as a boundary, creates an implied covenant that the alley would be kept open by the buyers for the use of others.

3. While the prescribed twenty-one year period required for adverse possession of real property can be established by tacking a prior owner's period of possession, the adverse possession of an owner must be transferred to successors in some lawful manner.

4. Acceptance of a deed describing boundary lines does not convey inchoate rights acquired by uncompleted adverse possession of property lying outside those boundary lines.

Paul F. Mower, Esq.,and
Joel R. Zullinger, Esq., Attorneys for Plaintiffs

Kenneth F. Lee, Esq., Attorney for Defendants

OPINION AND ORDER

EPPINGER, P.J., November 22, 1976:

In October, 1910, D. O. Allday laid out a plot of lots for the Grandview Realty Company in Chambersburg. The plot is recorded in the Franklin County, Pennsylvania deed records. Section C of that plan is bounded by Grandview Avenue on the West, High Street on the South, Glen Street on the East, and Miller Street on the North. That section consists of seventeen lots and shows a twelve (12) foot alley and two, 16-ft. alleys worked into the plan to give access to the rear of each lot. It is apparent that in the days when these lots were laid out, garages and other out buildings were entered from the rear because almost all of the lots were relatively narrow. There are two corner lots with 61 feet frontages. All the rest of the lots have either 40 foot or 32 foot frontages.

William R. Kuhn and Betty E. Kuhn, husband and wife, (Kuhns), acquired all of Lot No. 12 (40 foot frontage) and the southern 35 feet of Lot No. 13 fronting on Grandview Avenue. Behind these two lots, there is a 12 foot alley.

Ferree L. LeFevre and Mary Jane LeFevre, husband and wife, (LeFevres) acquired Lot No. 9 (32 foot frontage) and the eastern 20 feet of Lot No. 8. These lots front on High Street. The plot shows that the western boundary of Lot No. 9 is the same 12 foot alley that runs at the back of the Kuhn lands. The 12 foot alley separates the lands of the LeFevres and the Kuhns.

The Kuhns have now filed a Complaint in Equity to compel the LeFevres to remove obstructions placed by them in the 12 foot alley and restore it to its original condition so that the Kuhns can have free and uninterrupted use of the alley at the back of their lots and to enjoin LeFevres from continuing each obstruction. Before filing the Complaint, the Kuhns made a written demand on the LeFevres to remove the obstructions from the alley and to discontinue parking in it. The LeFevres have refused to do so, according to the Complaint.

The LeFevres filed An Answer to the Complaint, admitting that they have blocked the alley and refused to comply with the demand of the Kuhns to remove any obstructions. Then, in new matter, the LeFevres allege that